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Before the
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Application of SBC Communications Inc.,)
 Pacific Bell Telephone Company, and)
 Southwestern Bell Communications Services, Inc.)
 For Authorization Under Section 271 of the)
 Communications Act to Provide In-Region,)
 InterLATA Service in the State of California)

WC Docket No. 02-306

REPLY COMMENTS OF TELSCAPE COMMUNICATIONS, INC.

Telscape Communications, Inc. ("Telscape"), through its counsel, submits these reply comments in opposition to the application of SBC Communications Inc., Pacific Bell Telephone Company, and southwestern Bell Communications Services, Inc. (collectively, "SBC") for authority to provide in-region interLATA service in California. Telscape is a Monrovia, California facilities-based competitive local exchange carrier ("CLEC"), which offers bundled packages of local, long distance, and enhanced services. In Telscape's experience, Pacific Bell has engaged in repeated and persistent anticompetitive behavior in an effort to impede competitive entry into the marketplace by Telscape and other CLECs.

Comments in this proceeding overwhelmingly demonstrate that Pacific Bell does not satisfy several sections of the competitive checklist, including, *inter alia*, checklist items ii and v. Separate and apart from Pacific Bell's failure to comply with checklist items ii and v, Pacific Bell's unlawful winback activities preclude a finding that it is in the public interest to grant SBC's application, and, therefore, the Commission must deny the application

I. PACIFIC BELL'S SUBSTANTIAL BILLING PROBLEMS PRECLUDE A FINDING BY THE COMMISSION THAT PACIFIC BELL IS IN COMPLIANCE WITH CHECKLIST ITEM II

The record is replete with evidence that Pacific Bell is preventing competitive entry through its inadequate and discriminatory billing performance.¹ Section 271(c)(2)(B)(ii) (“checklist item ii”) requires Pacific Bell to provide “non-discriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1).”² To provide nondiscriminatory access to network elements under checklist item ii, Pacific Bell must demonstrate that it can produce readable, auditable, and accurate wholesale bills.³ Pacific Bell, however, does not satisfy checklist item ii, because it does not provide “wholesale bills [to its carrier customers] in a manner that gives competing carriers a meaningful opportunity to compete.”⁴ As such, the Commission must conclude that Pacific Bell does not satisfy checklist item ii and deny its application.

Competing carriers must receive accurate and timely wholesale bills from Pacific Bell to have a meaningful opportunity to compete. To date, Pacific Bell does not provide invoices to its carrier customers in a commercially reasonable manner. Indeed, in Telscape’s experience, the invoices that it receives from Pacific Bell are difficult to decipher and riddled

¹ See, e.g., Telscape Communications, Inc., *Ex Parte* at 1-3 (Oct. 18, 2002); Mpower Communications Corp., *Ex Parte* (Oct. 21, 2002) (providing affidavits in support of its comments addressing SBC’s billing problems, and stating that SBC repeatedly bills Mpower incorrectly, and that disputes are not handled in an accurate and timely manner); see also Comments of Vycera Communications, Inc. at 9-12 (listing numerous billing problems it has experienced with Pacific Bell).

² 47 U.S.C. § 271(c)(2)(B)(ii).

³ See *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, 17431-32, ¶¶ 22-23 (2001) (“*Verizon Pennsylvania 271 Order*”).

⁴ *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, 9043-44, ¶ 97 (2001).

with errors. Pacific Bell's inaccurate bills have cost Telscape hundreds of thousands of dollars in personnel resources. Indeed, several Telscape employees spend an inordinate amount of time (approximately seventy percent (70%)) solely auditing Pacific Bell's invoices (both electronic and paper); these employees must spend several hours on the phone with Pacific Bell each and every week in an attempt to decipher these invoices.

As a general matter, Pacific Bell repeatedly overbills – or incorrectly bills – Telscape, and fails to correct its billing systems such that Telscape receives complete and accurate invoices. For example, Pacific Bell continues to issue invoices to Telscape that contain the same types of billing errors week after week and month after month. Telscape must dispute each and every bill, and it takes Pacific Bell anywhere from six to fourteen months to resolve the disputes. In the meantime, Pacific Bell demands payment of the invoices for the disputed bills, and continues to issue inaccurate bills to Telscape as a result of defects inherent in Pacific Bell's billing system.

Moreover, even in those situations where Pacific Bell has acknowledged that it has billed Telscape in error, it has failed to issue an appropriate credit in a timely manner, if at all. Specifically, Pacific Bell incorrectly billed Telscape a "semi-mechanized" rate (\$48.48) for internal migrations from resale or the unbundled network element platform ("UNE-P") to UNE-loop instead of the mechanized rate (\$18.72) for which these orders are eligible. Although Pacific Bell agreed -- some time ago -- that the migrations were eligible for the mechanized rate, to date, it has not credited Telscape for the approximately \$125,000 in overcharges for these orders. As another example, Pacific Bell has failed to credit the appropriate resale discount to certain of Telscape's invoices. Nearly one year ago, in December 2001, Telscape notified Pacific Bell that it had improperly applied a 17% discount -- instead of a 32% discount -- to

certain Telscape resale accounts. Pacific Bell told Telscape not to submit a billing dispute, and assured it that the problem had been identified and a fix was in the works. To date, Telscape is still waiting for Pacific Bell to implement the “fix” and to credit it for erroneous overpayments.

Pacific Bell’s deficient billing systems – and its repeated failure to correct errors and make appropriate credits – have hampered (and will continue to hamper) the ability of Telscape and other CLECs to compete in the market. The Commission has emphasized that

[i]naccurate or untimely wholesale bills can impede a competitive LEC’s ability to compete in many ways. First, a [CLEC] must spend additional monetary and personnel resources reconciling bills and pursuing bill corrections. Second, a [CLEC] must show improper overcharges as current debts on its balance sheet until the charges are resolved, which can jeopardize its ability to attract investment capital. Third, [CLECs] must operate with a diminished capacity to monitor, predict and adjust expenses and prices in response to competition. Fourth, [CLECs] may lose revenue because they generally cannot, as a practical matter, back-bill end users in response to an untimely wholesale bill from an [ILEC]. Accurate and timely wholesale bills in both retail and BOS BDT format thus represent a crucial component of OSS.⁵

Telscape has experienced each of the problems identified above.’ Other commenters in this proceeding, including Mpower and Vycera, also have emphasized their repeated and persistent problems with Pacific Bell’s billing systems,’ and it is likely that there are additional carriers also experiencing the same billing issues that have not come forward

The Commission must consider the billing problems raised by the comments in this proceeding, and cannot rely solely on SBC-reported performance data. SBC has entered into billing settlement agreements with CLECs whereby SBC imposes a settlement condition that provides that any billing credits issued to the CLEC will not be subject to the terms of the

⁵ *Verizon Pennsylvania 271 Order*, 16 FCC Rcd at 17431-32, ¶ 23.

⁶ *See* Telscape Communications, Inc., *Ex Parte* (Oct. 18, 2002) (providing additional examples of Pacific Bell’s repeated and persistent billing errors).

⁷ *See supra* note 1.

California performance incentive plan. That is, SBC unilaterally excludes reporting these billing credits for performance measurement purposes, and, as a result, SBC's true performance for billing accuracy is effectively masked.' CLECs, unfortunately, have no choice but to sign these agreements if they want to resolve their billing disputes with SBC. The Commission, therefore, should not conclude that the billing problems described by Telscape and other commenters are not widespread simply on the basis of SBC-reported performance data. To the contrary, CLECs have experienced repeated problems obtaining accurate and timely bills. Accordingly, there is no basis for the Commission to conclude that Pacific Bell has satisfied checklist item ii, and, therefore, the application must be denied.

II. PACIFIC BELL HAS FAILED TO PROVIDE SHARED TRANSPORT FOR INTRALATA TOLL CALLS IN VIOLATION OF CHECKLIST ITEM V

Pacific Bell repeatedly has refused to facilitate Telscape's request to carry UNE-P intraLATA toll calls using shared transport, in direct violation of its obligations under checklist item v. Checklist item v requires Pacific Bell to provide "local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services." To comply with this checklist item, Pacific Bell must demonstrate that it provides transport (dedicated or shared) to a competing carrier under terms and conditions that are equal to the terms and conditions at which the ILEC provisions such elements to itself." Pacific Bell cannot make this showing

⁸ See Telscape Communications, Inc., *Ex Parte* at 2-3 (Nov. 1, 2002)

⁹ 47 U.S.C. § 271(c)(2)(B)(v).

¹⁰ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 315 (1996).

Akin to its obligations set forth in checklist item v, the Commission already has concluded that Pacific Bell “willfully and repeatedly violated” an Ameritech/SBC merger condition, which requires SBC to provide CLECs the option of using shared transport to route intraLATA toll calls, without restriction, between their end user customers and customers served by SBC. In rejecting SBC’s argument that the paragraph 56 merger condition applies only to local traffic – not intraLATA toll traffic -- the Commission stated that the language of the Act and the *UNE Remand Order* is “clearly and unambiguously inclusive and does not permit SBC to make exclusions based on the services for which a requesting carrier might use a UNE [including intraLATA toll service].”” Pacific Bell is engaging in the same conduct that the Commission found to be in direct violation of the merger conditions. Since Pacific Bell has an obligation to provide shared transport for intraLATA toll calls, but has failed to do so, the Commission must conclude that Pacific Bell is not in compliance with checklist item v, and deny the application

111. IT IS NOT IN THE PUBLIC INTEREST TO GRANT SBC’S APPLICATION

The comments in this proceeding unambiguously demonstrate that Pacific Bell has engaged in a pattern of anticompetitive conduct ultimately to the detriment of consumers, and, therefore, that it is not in the public interest to grant Pacific Bell’s application.¹² Separate and apart from the fourteen-point checklist, the Commission must not grant a section 271

¹¹ *SBC Communications Inc., Apparent Liability for Forfeiture*, File No. EB-01-1H-0030, NAL/Acct. No. 200232080004, Forfeiture Order, ¶ 18 (rel. Oct. 9, 2002).

¹² *See, e.g.*, Comments of AT&T Corp. at 77-80 (discussing, *inter alia*, Pacific Bell’s misleading marketing tactics); Comments of Vycera Communications, Inc. at 30-31 (demonstrating that it has been harmed by Pacific Bell’s winback activities).

application unless it concludes that “the authorization is consistent with the public interest.”” In evaluating whether SBC's application is in the public interest, the Commission must consider whether approval of the 271 application would foster competition in both the local and interLATA markets. Evidence in the record clearly demonstrates that Pacific Bell is purposefully inipcding competition throughout California through its winback activities, among other anticompetitive efforts, and therefore preclude a finding by this Commission that the public interest would be served by granting SBC's 271 application.

Pacific Bell's aggressive and anticompetitive marketing and win-back efforts have targeted Telscape's newly acquired customers. Telscape has documented numerous instances in which Pacific Bell takes customers from Telscape without any prior notice, and in some instances, with no notice at all, resulting in situations where Telscape continues to bill the customer, even though the customer has been migrated to Pacific Bell. Pacific Bell's winback efforts, in particular, are particularly egregious. In an effort to winback customers, Pacific Bell sends its previous customers a refund check. Where end-users have changed their service to Telscape, however, Pacific Bell sends those end users an exit letter suggesting that Telscape has slammed the customer, and inviting the customer to call Pacific Bell and inquire about special return offers and an extra quick return if the customer was slammed. Moreover, it appears that

¹³ 47 U.S.C. § 271(d)(3)(C). *See Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, 18360, ¶ 9 (2000) (stating that the Commission must not approve a 271 application unless it finds that the BOC's entry into in-region, interLATA market is “consistent with the public interest, convenience and necessity.”).

Pacific Bell unlawfully uses customer proprietary network information (“CPNI”) in its winback efforts.¹⁴

The size and scale of SBC puts all competitive carriers at a disadvantage when it comes to marketing and customer win-back efforts. With SBC/Pacific Bell controlling 94% of the phone lines in their California region, a 2% gain of market share would equate to a 30% reduction in CLEC market share. Thus, if SBC earmarked 2% of revenue for winback efforts, it would have a war chest that no competitive carrier could match, putting the CLEC community at a significant disadvantage. These on-going activities necessitate a finding that the instant application is not in the public interest, and that the Commission must deny SBC’s application.

¹⁴ See Telscape Communications, Inc. *Ex Parte* at 7-8 (Oct. 18, 2002); see also Comments of Vycera Communications, Inc. at 21-22.

IV. CONCLUSION

For the foregoing reasons, the Commission must deny SBC's application for authority to provide in-region interLATA service in California.

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November 4, 2002

CERTIFICATE OF SERVICE

I, Alice R. Burruss, hereby certify that on this 4th day of November, 2002, copies of
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